question is in effect a village street, I do not know what is.

The true principle applicable here is that every user of a highway owes a duty of care to all other users and he violates that duty if he does an act without reasonable care which injures any other user. I know of no authority to support the view that those duties owed to each other by users of a highway are in any way modified by the fact that the person who has suffered injury is a trespasser.

Indeed the weight of authority is the other way.

First there is the old case of *Davies* v. *Mann.*[11]

In that case the plaintiff hobbled an ass and turned it loose on the highway. In doing so he was clearly committing a trespass on the highway. The defendant's wagon which was being driven along the highway collided with the ass and it was held that if the wagon was being driven negligently then the defendant was liable. Lord Abinger C.B. said (at p. 548):—

"The defendant has not denied that the ass was lawfully on the highway, and therefore we must assume it to have been lawfully there; but even were it otherwise, it would have made no difference, for as the defendant might, by proper care, have avoided injuring the animal, and did not, he is liable for the consequences of his negligence, though the animal may have been improperly there."

Parke B. said this:—

"the judge simply told the jury, that the mere fact of negligence on the part of the plaintiff in leaving his donkey on the public highway, was no answer to the action, unless the donkey's being there was the immediate cause of the injury; and that, if they were of opinion that it was caused by the fault of the defendant's servant in driving too fast, or, which is the same thing, at a smartish pace, the mere fact of putting the ass upon the road would not bar the plaintiff of his action. All that is perfectly correct; for, although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief."

Much the same thing was said a hundred years later in the case of *Farrugia* v. *Great Western Railway Co.*[12]

In that case the plaintiff claimed damages for personal injuries sustained by him as a result of the negligence of the defendants' servant, a lorry driver, in attempting to drive under a railway bridge with his lorry so loaded that he could not clear the bridge. As a result of this a large box was thrown off the lorry on to the roadway and fell on the plaintiff injuring him. Shortly before the accident the plaintiff had been on the lorry as a trespasser but he had just got off and was running behind it. The defendants contended that they owed no duty of care to him because he was using the road for an unlawful purpose in that he was about to steal a second ride on the lorry.

It was held that the plaintiff was lawfully on the highway and the defendants owed him a duty of care.

In the Court of Appeal it was said that the question of whether or not the plaintiff was a trespasser was in effect irrelevant. Lord Greene M.R. said (at p. 567):—

"Even if it be the fact — and I am not saying it is — that when the plaintiff was running along the road, he was doing something in respect of which the owner of the soil of the highway could have maintained an action for trespass against him, it appears to me that that is a long way away from discharging the defendants from their liability to take care towards him."

Later he said:—

"It appears to me that the defendants and their driver, having created between them a potential source of danger which would impinge on anybody on the highway in the near neighbourhood, must be taken to have owed a duty towards anybody who might be on the highway in the near neighbourhood, whether he was there lawfully or whether he was there unlawfully. I cannot see, on any ground of principle or common sense, why a distinction should be made between the plaintiff running in the road to get on the lorry and a foot passenger lawfully crossing the road immediately behind the lorry. I should have thought the duty was a duty to take care *vis-a-vis* anyone — not this plaintiff as such, but anyone — the general class of persons who, at the moment when the danger materialised, might happen to be in the near neighbourhood."

These observations of Lord Greene are very apposite here and fortify me in the view that the law as stated in *Quinlan's* case is not applicable in the present case and that, apart from any question of contributory negligence, the plaintiff is entitled to damages. For myself I should have said that the degree of contributory negligence on her part was much greater than that imputed to her by the trial judge. Perhaps, however, I am unduly sensitive to noise and, in any event, that part of the decision has not been appealed against.

I would dismiss the appeal with costs.

Barakbah C.J. (Malaya) and Tan Ah Tah F.J. concurred.

Appeal dismissed.

Solicitors: *Jayadeva, Zahir & Ismi.*

LIM SING HIAW v. PUBLIC PROSECUTOR

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Ismail Khan J.) December 29, 1964]

[K.L. — Federal Court Criminal Appeal No. 76 of 1964]

Emergency Criminal Trial — Internal Security Act, 1960, ss. 57(1), 58(1) and 75 — Having under control a firearm — Consorting — Emergency (Criminal Trials) Regulations, 1964, reg. 4 — Validity of — Retrospective effect of changes in procedure.

Criminal Procedure — Joinder of charges — Discretion.

Criminal Procedure — Trial — Supply of copies of statements to judge.

Evidence — Confession — Original threat or inducement — Whether dissipated so as to make subsequent statement a voluntary one.

Courts of Judicature Act, 1964, s. 60(1) — Powers of Federal Court — Miscarriage of justice.

The appellant was tried and convicted for unlawful control of a firearm in contravention of section 57(1) of the Internal Security Act, 1960, and for consorting with armed persons in contravention of section 58(1) of the same Act and was sentenced to death. On appeal it was argued *inter alia*: (i) the trial was a nullity as it was not held before a judge and jury under the provisions of the Criminal Procedure Code (Cap. 6) but was heard by a judge alone under the provisions of the Emergency (Criminal Trials) Regulations, 1964, which came into force after the commission of the alleged offences but before the commencement of the trial; (ii) the two charges should not have been tried together; (iii) a miscarriage of justice was caused as the judge was supplied before the trial with copies of the statements made by the witnesses during the course of a police investigation; (iv) the confession of the accused should not have been admitted in evidence. It appeared that prior to the making of the statement to the police, the accused had been questioned by the Special Branch and according to him he had given a statement as he was threatened that if he did not do so he would be taken into the jungle and shot.

Held: (1) regulation 4 of the Emergency (Criminal Trials) Regulations, 1964, deals only with the mode of trial and being purely procedural is retrospective in its effect; and there is nothing in it which contravenes article 7(1) of the Federal Constitution, which prohibits punishment for an act which was not punishable by law when it was done or made;

(2) the question of joint or separate trial of charges is a matter within the discretion of the trial judge to be decided in the light of the particular circumstances of each individual case and there was nothing which would justify interfering with the way in which such discretion was exercised in this case;

(3) there was no possibility of a miscarriage of justice being caused by the supply of the statements recorded by the police to the judge in this case;

(4) the appellant's subsequent statement was wrongly admitted because there was no evidence to show that the original threat or premises made to the appellant to make the previous statement had been dissipated;

(5) considering the admissible evidence in this case the appeal must be dismissed because although the statement had been wrongly admitted there had been no substantial miscarriage of justice.

Cases referred to:—

(1) *R.* v. *Chandra Dharma* [1905] 2 K.B. 335, 338, 339.

(2) *Cheng Seng Hong & Ors.* v. *Public Prosecutor* [1949] M.L.J. 175, 179.

(3) *R.* v. *Smith* 43 Cr.App.R. 121, 129.

(4) *R.* v. *Haddy* 29 Cr.App.R. 182.

(5) *R.* v. *Cohen and Bateman* 2 Cr.App.R. 197, 207.

FEDERAL COURT.

T. T. Rajah for the appellant.

Mohd. Salleh bin Abas (Deputy Public Prosecutor) for the respondent.

Thomson L.P.: This appellant was convicted in the High Court in Malaya at Johore on 21st November, 1964, for unlawful control of a firearm in contravention of section 57(1) of the Internal Security Act, 1960, and for consorting with armed persons in contravention of section 58(1) of the same Act and was sentenced to death in respect of each offence.

He appealed against these convictions. On 14th December, 1964, we dismissed his appeal and stated we would give our reasons for doing so later. We now proceed to do so.

The charges against the appellant were as follows:—

"*1st charge*: That you between 7.30 a.m., on 17th August, 1964, and 11.30 a.m., on 23rd August, 1964, in the Security Area as proclaimed by the Yang di-Pertuan Agong, vide F.L.N. 245 dated 17th August, 1964, namely Kg. Senai, in the District of Pontian, in the State of Johore, without lawful excuse had under your control a firearm, to wit, one shotgun No. H.41378 without lawful authority and that you have thereby committed an offence punishable under section 57(1)(a) of the Internal Security Act, 1960.

2nd charge: That you between 7.30 a.m., on 17th August, 1964, and 11.30 a.m., on 23rd August, 1964, in a Security Area as proclaimed by the Yang di-Pertuan Agong vide F.L.N. 245 dated 17th August, 1964, consorted with members of the Indonesian Armed Forces who carried firearms and ammunition in contravention of the provisions of section 57 of the Internal Security Act, 1960, in circumstances which raised a reasonable presumption that you intended to act with such members of the said Indonesian Armed Forces in a manner prejudicial to public security and that you have thereby committed an offence punishable under section 58(1) of the said Act."

At the trial there was really very little controversy as to the facts of the case and indeed the defence did not produce a scrap of evidence to contradict the prosecution witnesses as to the material events, all of which occurred on 22nd and 23rd August, 1964.

On the evening of 22nd August Abdul Jalil, a fisherman, was returning with his son to his home on the Sungei Senai near Pontian when his son, who was rowing, invited his attention to two Chinese on the banks of the river. One of them was the appellant. He was holding a sten gun and he called the witness to him. The witness went up to the appellant and the other man, who was also carrying a firearm, and they caught hold of his sampan and asked him to take them to a place some miles upstream. Just then nine other people, all carrying arms, came out of the surrounding vegetation. The whole party then consisted of four Chinese (including the appellant) one Bugis and six Javanese. They asked the witness to take them to Singapore and when he was unwilling they asked him to take them to Indonesia. He said he would do so but that he must first go to his house. The whole party got into his boat and he took them to a spot near his house. There he told them to leave

their arms in his boat. He then took three of them to his house and the other eight to a neighbouring hut and gave them food and drink. The next morning he went to the police station at Pekan Nanas and reported the matter and then led a party of soldiers to where he had left the visitors.

His evidence was supported in all material particulars by his son, a boy of 14 years of age, but it is only fair to the appellant to say that the judge was not satisfied as to the reliability of this witness who was apparently very nervous in court.

Lieutenant Abbas bin Mohamed Yunus of the Malay Regiment said that on the morning of 23rd August with a platoon of 33 men he was led by the witness Abdul Jalil to his house on the Sungei Senai. As they approached three men ran out of it. The soldiers fired on them but they escaped. The soldiers then approached a neighbouring hut. They threw handgrenades into it and called on any persons in hiding to come out or else they would be shot. On this four Chinese dressed in under-clothes came out of the long grass near the hut. They were unarmed and they surrendered. Later they led the witness to a boat in which were six rifles and four sub-machineguns of a type known as sten guns. The soldiers followed up the men who had run away and in the course of fighting in which handgrenades were thrown two of them who appeared to be Indonesian soldiers were killed.

The next witness was Lance Corporal Mohamed Zain bin Othman who was a section commander in Lieutenant Abbas' platoon. His evidence was substantially the same as that of his officer but he identified the appellant as one of the four Chinese who were caught near the hut beside Abdul Jalil's and as the man who led the troops to the boat where the weapons were found.

Apart from the production of one of the sten guns found in the boat the only other evidence for the prosecution was a statement made by the appellant to the police on 26th August, 1964. This, though actually it did not take the case very much further, related in very great detail how the appellant after leaving school was invited to go to Indonesia for military training with a view on his return to joining the Malayan Liberation Army and "liberating" the country from the present Government. He described his training in Indonesia and how eventually he and a number of other Chinese and Indonesians, all armed, were taken to Malaya in boats. They wandered about the country for some time and ultimately some of them including himself met the witness Abdul Jalil who agreed to take them back to Indonesia. The following morning they were surprised by the soldiers. He was captured and some of the others were captured or killed. At the time he had been considering surrendering.

This statement was tendered and admitted in evidence under the provisions of section 75 of the Internal Security Act. Its admission constitutes one of the grounds of appeal and we shall return later to the circumstances in which it was made.

To conclude the narrative of the trial, at the close of the case for the prosecution counsel for the appellant submitted there was no case to answer but the judge ruled against him. The appellant was then invited to make his defence but all he had to say was: "I have taken the advice of my lawyer. I elect to remain silent." In the circumstances it is perhaps not surprising that he was convicted on both charges.

There were a number of grounds of appeal but with one exception they can, without discourtesy to counsel, be disposed of somewhat cursorily.

In the first place it was said that the trial was a nullity because it was not held before a judge and jury under the provisions of the Criminal Procedure Code but was heard by a judge alone under the provisions of the Emergency (Criminal Trials) Regulations, 1964, made under section 2 of the Emergency (Essential Powers) Act, 1964, which came into force on 18th September, 1964, that is to say on a date after the date of the commission of the alleged offences but prior to the commencement of the trial of the appellant on 15th November, 1964.

It is not necessary to deal with the validity of these regulations as a whole which has not been questioned nor is it necessary to state their contents in any great detail. They provide for the mode of trial of certain offences and the only one in point here is regulation 4 which, as amended with effect from 16th October, 1964, reads as follows:—

> "Where a person is charged with any offence against any written law (whether committed before or after the commencement of these Regulations) and the Public Prosecutor certifies in writing that the case is a proper one for trial under these Regulations, such case shall not be tried by a jury or by a judge with the aid of assessors but shall be tried by a judge without the aid of assessors and disposed of in accordance with the provisions of these Regulations."

It was under this regulation that the trial of the appellant was held and his counsel contended that the regulation itself was null and void because it was retrospective and that accordingly a trial held under it was a nullity. What he meant presumably, though he did not say so, was that the regulation was null and void by reason of being in conflict with article 7(1) of the Constitution which reads as follows:—

"No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed."

In our view this is wrong and without substance because the regulation has nothing to do with the creation of any offence or with punishment for any offence. It deals with the mode of trial of certain offences and is purely procedural. There is nothing in it which sins against article 7(1). Nor does it contravene any accepted canon of construction. In the case of *Rex* v. *Chandra Dharma* [1] Lord Alverstone C.J. said:—

"The rule is clearly estabilshed that, apart from any special circumstances appearing on the face of the statute in question, statutes which make alterations in procedure are retrospective."

And Channell J. said:—

"I agree; but I wish to say that in my view a statute dealing only with procedure applies to past events as well as to future events, and to hold this is not to make the statute retrospective. The object of the statute is only to affect the procedure, and it matters not whether the events in respect of which the proceedings are taken happened before or after the passing of the Act."

Then it was said that the two charges should not have been tried together. Now, there is nothing in the Criminal Procedure Code which prevented the charges being tried together because the alleged acts were clearly part of the same transaction and the case therefore fell within section 165(i) of the Code. Moreover, the application for separate trials before Azmi J. was not founded on the circumstances of the particular case but on the general proposition that injustice must inevitably occur. This was based on the following observation by the former Federation Court of Appeal in the case of *Cheng Seng Hong & Ors.* v. *Public Prosecutor* [2] in relation to the former Emergency Regulations of 1948:—

"We think it right, however, to indicate our view that the evidence admissible upon a charge of consorting is so much wider in range than that which would be admissible on the simpler issue of carrying or possession of an arm or ammunition that the effect of joining a charge in respect of this lesser offence is likely to have the effect of prejudicing the minds of the Assessors in regard to the capital charge. We are of opinion, therefore, that a charge of consorting should not as a general rule be joined with a capital charge."

Before us the argument was not taken any further and again no reference was made to the actual circumstances of the case.

We do not dissent from the opinion of the former Court of Appeal though, of course, it has less force where a case is to be tried by a judge alone than where it is to be tried by a judge and assessors as was the case under the 1948 Regulations. Nevertheless the question of joint or separate trial of charges is, within the limits of the Criminal Procedure Code, a matter within the discretion of the trial judge and is to be decided in the light of the particular circumstances of each individual case. In the present case we can see nothing in the way of injustice or possible miscarriage of justice that could possibly be attributed to the trial of the two charges together and would justify us in interfering with the way in which Azmi J. exercised his discretion in refraining to order separate trials.

Again it was said that before the date of the trial the judge was supplied with copies of the statements made by witnesses during the course of the police investigation and that a miscarriage of justice might thereby have been caused.

The Emergency (Criminal Trials) Regulations provide (regulation 5) that no preliminary inquiry is to be held in respect of a case to which they apply, but the prisoner is to be committed for trial on production of a certificate by the Public Prosecutor. They also provide (regulation 10) that in such cases the prosecution must prior to the date of trial furnish the accused person or his lawyer with copies of statements made during the police investigation of all persons whom it is intended to call as witnesses for the prosecution. Clearly it is the intention that these statements should take the place of depositions and in the circumstances we can see no reason why copies of them should not be supplied to the judge, as was indeed invariably the practice during the currency of the former Emergency Regulations of 1948. Clearly the judge must be in possession of such material if he is to be prepared to meet any difficulties which may arise in the course of the trial and also if necessary, as pointed out by Azmi J. to assist the defence. It was said there was a distinction between such statements and depositions supplied in the ordinary way because in the ordinary way the trier of fact would not be the judge but a jury or assessors. This is not quite correct. Under the normal criminal procedure in Johore, depositions are required to be supplied to the court in every case (see Criminal Procedure Code section 147) and no distinction is drawn between cases triable by a judge alone and cases triable by a judge and jury.

In any event we see no possibility of a miscarriage of justice being caused on the part of an experienced judge who is in the habit of trying criminal cases where he is invariably supplied in advance with copies of the depositions of the prosecution witnesses.

We come now to the only ground of appeal which is of any substance, and that is the ground that the appellant's statement containing his confession should not have been admitted in evidence.

The appellant was arrested in the circumstances which have been described on 23rd August, 1964, and was thereafter in police custody. On 26th August he was interviewed by a police officer, Inspector Lingam, with the aid of a Mr. Cheng, a schoolmaster, as interpreter.

At the trial there was considerable controversy as to what happened at that interview.

The evidence of Inspector Lingam and of Mr. Cheng was that the caution required by section 75 of the Internal Security Act was administered to the appellant who then proceeded partly by way of answers to questions and partly spontaneously to make a statement in the Chinese language which Mr. Cheng interpreted into Malay and Inspector Lingam wrote down in English. They were emphatic that no pressure of any sort was put on the appellant and no threats or promises were made. On the other hand the appellant's evidence regarding this interview was that he was assaulted and threatened and thereby induced to make his statement. It was a question of relative credibility and the trial judge accepted the evidence of Inspector Lingam and Mr. Cheng and said he thought the appellant was lying. If that was all there was to it that would be the end of the matter and we should be bound to say that the statement was properly admitted.

But that was not all there was to it. The appellant also said that for three days after he was caught by the soldiers and before he came into the hands of Inspector Lingam he was in the hands of members of the special branch and that during this time they elicited from him a statement (he did not say whether in the same terms as the statement he made to Inspector Lingam) by showing him the body of his friend who had been killed on 23rd August and threatening that if he did not make a statement he himself would be taken out into the jungle and shot and photographs of his body taken and his relatives informed that he has been killed in action.

This part of the appellant's evidence may or may not have been entirely true, indeed it may not have been true at all. It was, however, uncontradicted. Moreover, there is nothing inherently improbable about it. We are not for one moment imputing any impropriety to members of the special branch. It must, however, be remembered, and I think we all have knowledge of this, that at this time the country was very disturbed and was full of rumours as to the presence of invaders from across the sea. Some of the persons seen in company with the appellant were still at large. There was every reason to think the appellant was associated with the invaders and it is highly probable that special branch officers did endeavour to elicit some information from him; indeed they would have been failing in their duty if they had not done so, and if they uttered threats who could blame them? It was their business to get information and to get it quickly and they were not concerned with anything that might happen later in the way of prosecuting the appellant.

At the trial, however, no attempt was made to call any police or army officer who could say what happened to the appellant during the three days he was in custody prior to making his statement to Inspector Lingam. In the circumstances we think the trial judge should have accepted it that at the lowest there might well be some truth in the appellant's uncontradicted story and that the appellant made some sort of statement previously. It would then have been necessary for the prosecution to show that something was done by Inspector Lingam to remove any impression that might have been made by any threats or promises that might have been used to induce the appellant to make that previous statement. The present state of the law on this point was thus stated by Parker C.J. in the case of *Smith*:— [3]

> "Only if the time limit between the two statements, the circumstances existing at the time and the caution are such that it can be said that the original threat or inducement has been dissipated can the second statement be admitted as a voluntary statement."

Nothing of the sort was done and we are therefore compelled to say that the prosecution failed to show that the appellant's statement was voluntary and so we must hold that it was wrongly admitted.

To that extent the appeal succeeds. In our view, however, the case clearly falls within the proviso to section 60(1) of the Courts of Judicature Act which is the same as the proviso to section 4(1) of the English Criminal Appeal Act, 1907, and reads as follows:—

> "Provided that the Federal Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred."

The English proviso was considered by the English Court of Criminal Appeal in the case of *Haddy*.[4] They quoted the following observations of Channell J. in the case of *Cohen and Bateman*:— [5]

> "If, however, the court in such a case comes to the conclusion that, on the whole of the facts and with a correct direction, the only reasonable and proper verdict would be one of guilty, there is no miscarriage of justice within the meaning of the proviso."

They went on to say (*per* Humphreys J. at p. 190):—

"That statement of the law has stood for thirty-five years and, so far as we are aware, has never been the subject of adverse comment".

A few months later that decision was approved by the House of Lords in the case of *Stirland.*[6] In that case the Lord Chancellor (Viscount Simon) said (at p. 46):—

"When the transcript is examined, it is evident that no reasonable jury, after a proper summing up, could have failed to convict the appellant on the rest of the evidence to which no objection could be taken. There was, therefore, no miscarriage of justice and this is the proper test to determine whether the proviso to section 4(1) of the Criminal Appeal Act, 1907, should be applied."

and he went on to say:—

"The Court of Criminal Appeal has recently in *Haddy*....correctly interpreted section 4(1) of the Criminal Appeal Act."

Considering the admissible evidence in the present case, which was in no way contradicted, we are of the opinion that no reasonable trier of fact could have failed to convict the appellant.

For these reasons we dismissed the appeal.

Appeal dismissed.

RE HOON TYE WAN

[Misc. Cr. App. (Ong J.) September 26, 1964]

[Ipoh — Miscellaneous Criminal Application No. 14 of 1964]

Constitutional Law — Citizen of Malaysia by operation of law — Malaysia Act, 1963, s. 23 — Constitution of Malaysia, arts. 9 and 14(1)(c) — Constitution of Singapore, art. 54(1) — Singapore Citizenship Ordinance, 1957, s. 4.

Banishment — Whether Singapore citizen who becomes citizen of Malaysia by operation of law banishable — Banishment Ordinance, 1959, s. 5.

A citizen of Singapore who becomes a Malaysian citizen by operation of law under article 14 of the Constitution of Malaysia is not banishable.

[Editorial Note: The Singapore Citizenship Ordinance, 1957, was repealed by article 69 of the Constitution of Singapore.]

MISCELLANEOUS CRIMINAL APPLICATION.

Applicant in person.

Pawan Ahmad bin Ibrahim Rashid (State Legal Adviser, Perak) for the Minister for the Interior.

Ong J.: This is an application under section 10 of the Banishment Ordinance, No. 11 of 1959, to set aside a banishment order made by the Honourable the Minister against the subject pursuant to section 5. Now, section 5 provides that a banishment order can only be made in respect of any person *not being a citizen of the Federation.* That is in accordance with Article 9 of the Constitution, which enacts that no citizen shall be banished from the Federation.

In an application to set aside the order, the burden of proof that he is a citizen of the Federation lies upon the applicant. In this particular instance, the Legal Adviser, Perak, has considered and accepted the fact of the applicant's birth in Singapore, as evidenced by a birth certificate produced by him. He contends, however, that birth in Singapore *ipso facto* could not confer citizenship status upon the applicant, as article 54(1) of the present Singapore Constitution only applies to persons after the coming into operation of the Constitution. He further contends that the only way the applicant could be a citizen of Singapore in his particular circumstances would be by registration or enrolment, or naturalisation.

It is abundantly clear that the Legal Adviser was not aware of the existence of the Singapore Citizenship Ordinance, No. 35 of 1957, under section 4 of which every person (subject to the proviso therein) born in the Colony *before* on or after the date of the coming into operation of Part III of that Ordinance shall be a citizen of Singapore by birth. That Ordinance came into force on the 1st day of November, 1957. Section 23 of the Malaysia Act re-enacts article 14 of the Constitution and in clause (1)(c) makes provision for every citizen of Singapore to become a citizen by operation of law on the relevant date.

In the circumstances, there is no doubt whatsoever that the applicant is not banishable and I, therefore, set aside the order of banishment and direct that he be forthwith set at liberty.

Order of banishment set aside.